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No. 94-1495

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

WINBACK AND CONSERVE PROGRAM, INC., and ALFONSE G. INGA,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly held as a matter of federal unfair competition law that an entity may be held vicariously liable for the foreseeable acts of its independent contractor agents that violate Section 43(a) of the Lanham Act, where those agents are authorized to conduct transactions with third parties, where reliance by third parties on those actions is reasonable, and where the entity benefits financially from those transactions.

RULE 29.1 LISTING

Company Name

835 Michigan Corp.
A/O Telmos
ABC Travelbank Limited
AG Communication Systems Corporation
AT&T Automotive Services, Inc.
AT&T Business Communications Europe Ltd.
AT&T Easylink Services Australia, Ltd.
AT&T Italtel Network Systems SA/NV
AT&T Japan Semiconductor Marketing, Ltd.
AT&T Jens Corporation
AT&T Microelectronica De Espana S.A.
AT&T Network Systems International B.V.
AT&T of Shanghai Ltd.
AT&T Prague s.r.o.
AT&T Ricoh Co. Ltd.
AT&T Software Japan Ltd.
AT&T St. Petersburg (Russian Federation)
AT&T Taiwan Telecommunications Co., Ltd.
AT&T Telfa, S.A.
Barphone
Cab Computeranwendungs-Beratungs GmbH
Claimview Limited
Drescher-NCR Druck GmbH
Goldstar Fiber Optics Co., Ltd. (RCK)
Integradora De Telecomunicaciones S.A. De C.V.
Litespec
Lycom A/S
NCR Gabon S.A.R.L.
P.T. AT&T Network Systems Indonesia
Trans-India Network Systems Pyt. Ltd.
Transporte Digital De Informacion C.A.
Winding Brook Corporation
3DO Company

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American Mobile Satellite Corporation
Ampco-Pittsburgh
APT Italia S.P.A.
ASA Capital Vectors, Inc.
AT&T Network Technologies (Thailand) Co., Ltd.
Business Machines Limited
Chipsoft, Inc.
Coltec Holdings, Inc.
Counterpart Computers, Inc.
Fort Howard Corporation
General Magic, Inc.
Goldstar Information and Communications
Insurance Trading Exchange Ltd., The
Intermetrics Inc.
Italtel Societa' Italiana Telecommunicazioni
Jamaica Digiport International, Ltd.
Lexmark International, Inc.
Little Switzerland I
Los Angeles RCC's, Inc.
Memorex Telex Nederland B.V.
Mesabi Trust
Mitek Systems, Inc.
Montel Del Noroests, De C.V.S.A.
NCR (Bahrain) W.L.L.
NCR Japan Sales Co., Ltd.
Novo Quality Services Pte. Ltd.
Omnicad
Rasterops
Smar Tone
Societa Italiana Telecommunicazioni S.p.A.
Spectrum Holobyte, Inc.
Sundisk Corporation
Telehouse America Inc.
United Fiber Optic Communications Inc. Co., Ltd. (UFOC)

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Utel (Ukraine)
Western Electric Saudi Arabia, Co., Ltd.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case presents neither the conflicts the Petition alleges nor any other issues worthy of this Court's review. The court below correctly noted that § 43(a) of the Lanham Act is ambiguous concerning the extent of vicarious liability and appropriately looked to and applied common law agency doctrine to § 43(a), as other courts, including this Court, have traditionally done when construing federal statutes that prohibit tortious conduct. The application of vicarious liability under § 43(a) unquestionably advances the goals of the Lanham Act, by ensuring that entities that benefit financially from unfair competition and false designations of origin are held civilly responsible for such tortious conduct committed on their behalf. The decision below in no way conflicts with this Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S. Ct. 1439 (1994), and is completely consistent with decisions of the Seventh and Eleventh Circuits, which, as the court below, have likewise acknowledged the propriety of applying common law theories to enforce remedies under the Lanham Act. Petitioners' claims to the contrary depend entirely on their mischaracterizations of the Third Circuit's ruling.

STATEMENT OF THE CASE

Since the Federal Communications Commission's ("FCC") ruling in 1976 that Respondent American Telephone and Telegraph Company ("AT&T") must offer for

resale access to its long distance telecommunications network, entities termed "aggregators" or "resellers" have emerged as both customers and competitors of AT&T. *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976). An aggregator (or reseller), such as petitioner Winback and Conserve Program, Inc. ("Winback"), subscribes to a high volume/high discount long distance telecommunications service, and then uses that service to provide its own long distance telephone service to others.

An aggregator is a customer of AT&T. Those entities that purchase the aggregator's service, usually called "end users," are the aggregator's customers; they are not AT&T customers and do not enjoy all the benefits of being an AT&T customer. Because aggregators, like petitioner Winback, are often either start-up enterprises or lack the widespread name recognition that AT&T has developed through extensive use of, and investment in, its trademarks, aggregators often attempt to position the provision of their service as being somehow affiliated with AT&T. As competitors of AT&T, however, Winback and other resellers operate separately from, and independently of, AT&T and are permitted neither to use AT&T's trademarks nor to represent themselves as being affiliated with AT&T.

At the time of AT&T's application pursuant to § 43(a) of the Lanham Act for a preliminary injunction, Winback had arrangements with approximately 50 organizations that were authorized by Winback to promote and sell Winback's service, in Winback's name and on its behalf, throughout the United States. (*Petition for a Writ of Certiorari* ("*Pet.*") at 4). Those representatives, in turn, with

Winback's knowledge and permission, often contracted with other individuals or "subagents" to carry out promotional, marketing, and sales activities in Winback's name, on its behalf, and in furtherance of Winback's financial benefit. (*Petition Appendix* ("*Pet. App.*") at 47a).

AT&T demonstrated at the preliminary injunction hearing that these agents and subagents exhibited a broad disregard for AT&T's rights in AT&T's name and service marks, as well as for the requirements of fair competition.[1] The district court nevertheless denied AT&T's application, finding that Winback's representatives were "independent contractors" for whom Winback had no vicarious liability for the tort of unfair competition as expressed in § 43(a) of the Lanham Act.

AT&T appealed that decision to the Court of Appeals for the Third Circuit, which vacated and remanded the district court's decision for having failed to consider adequately the various agency theories under which Winback could be held liable for its marketing representatives' violations of the Lanham Act. (*Id.* at 84a). The Court of Appeals correctly focused its inquiry on the actions of Winback's agents and subagents, recognizing the injustice of permitting a company to benefit from undeterred unlawful acts while not being legally

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[1] As the Court of Appeals noted, AT&T's action against Winback followed AT&T's having previously brought suit against One Stop Financial, Inc., another aggregator owned by Petitioner Inga, for similar violations of § 43(a) in which One Stop Financial consented to a Final Injunction. AT&T's action against Winback sought to enjoin conduct for which Inga's other company had previously agreed to be enjoined. (*Pet. App.* at 45a).

responsible for that same illegal conduct. (*Id.* at 71a). Although § 43(a) of the Lanham Act refers to "any person" who infringes a plaintiff's rights, it is ambiguous as to the *extent* of vicarious liability. Because the Lanham Act has the "broad purpose of 'protect[ing] . . . competitors from a wide variety of misrepresentations of products and service,' " (*id.* at 70-71a) (citing *20th Century Wear, Inc. v. Sanmark-Stardust, Inc.*, 747 F.2d 81, 91 (2d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)), the Court of Appeals concluded that it was appropriate to refer to the common law of agency to determine the extent of liability under § 43(a) of the Lanham Act. (*Id.* at 72a).

The Court of Appeals further reasoned that this Court's holding in *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S. Ct. 1439 (1994), did not preclude the imposition of liability vicariously under § 43(a) of the Lanham Act. (*Pet. App.* at 61a). After a careful review of that decision, the Third Circuit correctly concluded that, in *Central Bank*, this Court refused to "broaden[] the range of unlawful *conduct* beyond that specifically proscribed by the Act." (*Id.*) (emphasis added). "By contrast, courts imposing liability on agency theories are not expanding the category of affirmative conduct proscribed by the relevant statute; rather, they are deciding on whose shoulders to place responsibility for conduct *indisputably proscribed* by the relevant statute." (*Id.* at 63a) (emphasis in original). The Court of Appeals also relied on the fact that this Court had previously applied common law principles to the Lanham Act, *see Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982), as well as the fact that common law agency principles had

been applied by this Court (and many lower courts) to enforce a variety of other federal statutes.

The Court of Appeals accordingly considered and applied agency law to the facts of the case, and determined that the district court's characterization that Winback's sales agents and subagents were "independent contractors" did not insulate Winback from liability. (*Pet. App.* at 76a). The Court of Appeals ruled that if, upon remand, the district court found Winback's independent contractors to be what it called "agent independent contractors," Winback would be liable "pursuant to section 43(a) of the Lanham Act based on the agents' *foreseeable* infringing actions upon which it would be reasonable for the third party to rely, provided the third party has no notice that the representations are unauthorized." (*Id.* at 82-83a) (emphasis in original).

The Court of Appeals also held that because a principal can be liable for an agent's misrepresentations under the doctrine of apparent authority, the district court should have evaluated both Winback's actions and the third parties' beliefs in order to determine if Winback was liable under the theory of apparent authority. (*Id.* at 87a). We demonstrate here that the Court of Appeals' decision was correct and need not be reviewed by this Court.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS IN ACCORDANCE WITH ESTABLISHED PRECEDENT AND DOES NOT LEGISLATE A NEW STANDARD FOR LIABILITY UNDER THE LANHAM ACT.

The Court of Appeals' decision to employ agency principles to determine liability for violations of § 43(a) of the Lanham Act in no way transgresses the limits of proper statutory interpretation, and is fully consistent with this Court's opinion in *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S. Ct. 1439 (1994).

Section 43(a) of the Lanham Act provides that "any person who" engages in a variety of prohibited acts "shall be liable in a civil action" initiated by the person who believes he or she is damaged. 15 U.S.C. § 1125(a). The Court of Appeals recognized that while the scope of a court's interpretation is constrained by the statutory language, (*Pet. App.* at 59a) (citing *Central Bank*, 114 S. Ct. at 1447), the statute here is ambiguous as to the existence or scope of vicarious liability. In resolving this ambiguity, the lower court recognized that common law principles apply to federal statutes when "those principles advance the goals of the particular federal statute which plaintiffs allege has been violated." (*Id.*) (quoting *PetroTech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1356 (3d Cir. 1987)).

Here, common law doctrines of vicarious liability in tort unquestionably advance the goals of the Lanham Act. The intent and purpose of the Lanham Act is to guard against "consumer deception (i.e. purchase of a good that is not what the consumer intended to purchase, but

because of . . . deceptive imitation . . . appears to be the genuine trademarked good)," *Weil Ceramics & Glass, Inc. v. Dash*, 878 F.2d 659, 672 (3d Cir.), *cert. denied*, 493 U.S. 853 (1989), and to protect the trademark holder's investment against unfair competition. *Id.* The Lanham Act therefore "mak[es] actionable the deceptive and misleading use of marks," in order "to protect . . . against unfair competition." 15 U.S.C. § 1127.

As in the remedies for other torts, common law principles of vicarious liability facilitate effective enforcement of the Lanham Act by establishing liability for responsible actors who benefit from the tortious conduct proscribed by the Act. Secondary liability, apart from "contributory" infringement, is a legitimate basis for assessing liability under the Lanham Act because "the Lanham Act is derived generally and purposefully from the common law tort of unfair competition . . . [and it] federalizes a common law tort." (*Pet. App.* at 69a). Indeed, the Court of Appeals correctly observed that courts construing the Lanham Act "routinely have recognized the propriety of examining basic tort liability concepts to determine the scope of liability." (*Id.*) (collecting authorities).

The Court of Appeals, moreover, addressed and properly rejected Winback's argument that importation of common law principles of vicarious liability to the Lanham Act (itself a statutory expression of long-standing common law rules) amounted to judicial legislation prohibited by *Central Bank*. In *Central Bank*, the Tenth Circuit had read § 10(b) of the Securities Exchange Act of 1934 to proscribe *conduct*, aider and abettor liability, that was *not* explicitly addressed by § 10(b). This Court ruled that aider and abettor liability could not be implied from the

statute and that it was error to do so. *Central Bank*, 114 S. Ct. at 1455.

By contrast, the Court of Appeals here did not expand prohibited conduct; it simply applied traditional tort rules for vicarious liability to establish civil responsibility for conduct comprising unfair competition that the Lanham Act has long prohibited. The Court of Appeals expressed this sentiment clearly and in concordance with *Central Bank*: "courts imposing liability on agency theories are not expanding the category of affirmative conduct proscribed by the relevant statute; rather, they are deciding on whose shoulders to place responsibility for conduct *indisputably proscribed* by the relevant statute." (*Pet. App.* at 63a) (emphasis in original). That distinction answers Winback's argument completely, for vicarious responsibility under the Lanham Act is accordingly consistent with the goals of the Act and the common law, as well as tenets of fundamental fairness holding a principal responsible for the acts of its agents from which it benefits.

The propriety of applying agency doctrines to federal statutes, moreover, is demonstrated by the consistent application of such law by this Court (and others) to a variety of cases. (*See id.* at 65a). For example, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, *reh'g denied*, 456 U.S. 1116 (1982), this Court applied the agency law doctrine of apparent authority to impose liability in an antitrust action, noting that "[t]he apparent authority theory has long been the settled rule in the federal system." *Id.* at 567. There is nothing to suggest that apparent authority is *not* the settled rule in the Lanham Act, which is manifestly a part of the federal system.

This Court's application of the common law principle of contributory infringement, one form of secondary liability, under the Lanham Act in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982), further supports the Court of Appeals' ruling. Dealing with trademark infringement under § 32 of the Lanham Act, this Court held in *Inwood* that a generic drug manufacturer who acted as a mere supplier to pharmacists could be held vicariously liable for the pharmacists' trademark infringement only if the manufacturer "contributed" to the infringement. *Id.* at 854. Because § 32 of the Lanham Act does not use the term "contributory infringement," *cf.* 35 U.S.C. § 271 (expressly prohibiting *contributory* infringement in patent cases), this species of vicarious liability under the common law had been judicially engrafted previously onto the remedial aspects of the predecessor to the Lanham Act to further its purpose. *See, e.g., William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526 (1924). Although this Court disapproved a broader theory of contributory infringement, nothing in *Inwood* (or anywhere else) suggests that contributory infringement is the sole theory of vicarious liability appropriate under the Lanham Act. Indeed, in *Inwood*, there was no reason or basis to apply either agency theories or apparent authority theories to determine liability because the infringing pharmacists were only *customers* of the defendant manufacturers, not the agents that Winback's representatives are here. *Inwood* thus provides no support for the conclusion, which Winback argues should be drawn, that agency theories are impermissible under the Lanham Act.

To the contrary, as the Court of Appeals explained:

> The only feasible way for AT&T to assert its federal rights would be to sue the principal, who, if an agency relationship is established, is able to exercise at least some control over its agents, who authorized the sales representatives to enter into contracts on its behalf, and who receives direct financial benefits from those contracts. If the Act prohibited such liability, then infringing actions would continue undeterred, a company would benefit from undeterred unlawful acts, and the statute's purpose to prohibit unfair competition would go unrealized.

(*Pet. App.* at 71a). Those sentiments support the Court of Appeals' conclusion and are in line with this Court's directions for appropriate statutory construction.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE LAW IN OTHER CIRCUITS AND DOES NOT CREATE A DIVISION IN AUTHORITY.

The decision below does not conflict with the cases singled out by Winback. Indeed, although those cases involve facts worlds apart from those here, the decisions are in harmony with what the Court of Appeals did.[2]

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[2] The Court of Appeals, after all, recognized those decisions, analyzing and distinguishing them in reaching its decision.

As the Court of Appeals recognized, the Seventh Circuit's opinion in *Hard Rock Cafe Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992), does not conflict with its decision. Winback bases its claimed conflict on the fact that *Hard Rock* did not apply the broader doctrine of vicarious liability applicable to copyright violations to trademark infringements. But the Third Circuit likewise rejected the broad doctrines of vicarious liability applicable to copyright actions: those doctrines "go well beyond agency theory, for [they] would not rely on situations where the agent is acting on behalf of the principal or as the principal's alter ego." (*Pet. App.* at 90a).

In fact, *Hard Rock* supports the Court of Appeals' decision here, because the Seventh Circuit noted that it, too, has "treated trademark infringement as a species of tort and [has] turned to the common law to guide [its] inquiry into the appropriate boundaries of liability." *Hard Rock*, 955 F.2d at 1148. The Seventh Circuit also observed in *Hard Rock* that the defendant *might* have been liable for the trademark violations by the actual infringer, *id.* at 1149, but the facts of the relationship between the actors there – an absentee landlord for a flea-market leasing space to a tenant that happened to sell infringing goods – did not support such vicarious liability. *Hard Rock* thus holds that common law secondary liability principles, in addition to those of contributory infringement, *can* apply to Lanham Act claims. *Id.* The Third Circuit's decision says the same, but in greater detail and analysis because the facts here, unlike *Hard Rock*, justified vicarious liability.

Similarly, the Eleventh Circuit's decision in *Mini Maid Services Co. v. Maid Brigade Systems, Inc.*, 967 F.2d

1516 (11th Cir. 1992), does not conflict with the decision below. Confronted with facts markedly different from those before this Court, the Eleventh Circuit held that "a franchisor may not be held liable for *a single franchisee's* infringement solely because the franchisor failed to exercise reasonable diligence to prevent the violation. . . . " *Id.* at 1521 (emphasis added). The Eleventh Circuit in fact agrees with the Court of Appeals here in finding that "liability for trademark infringement can extend beyond those entities that actually perform the acts of infringement." *Id.* at 1522. Just as in *Hard Rock*, moreover, the *Mini Maid* court found that common law agency liability is appropriate under the Lanham Act.[3] *Id.* All *Mini Maid* stands for is that the affirmative duty to police one's own trademarks does not create a corollary duty to police the infringements of other marks by one's licensees. As in *Hard Rock*, *Mini Maid*'s analysis is fact-sensitive, turning on the relationship between the actor directly causing the infringement and the entity sought to be held vicariously liable.

The fact is that the Lanham Act was designed both to protect the public from misrepresentations as to the origin of a product or service, and to protect the owner of the trademark or service mark from the unauthorized use of good will associated with a well-established name.

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[3] The *Mini Maid* court stated, "Following the lead of *Inwood Laboratories*, we conclude that liability for trademark infringement can extend beyond those entities that actually perform the acts of infringement, but only under certain circumstances." *Mini Maid*, 967 F.2d at 1522. Nothing in *Mini Maid* suggests that contributory infringement is the *only* mechanism for finding secondary liability available under the Lanham Act.

S. Rep. No. 1333, 79th Cong., 2nd Sess. (1946), *reprinted in* 1946 *U.S.C.C.S.* 1, 1274. Contrary to Winback's claim, the Court of Appeals' application of an agency theory to the Lanham Act does not inequitably benefit large companies such as AT&T. Small businesses, just as large ones, develop trademarks that may require protection when a competitor seeks to capitalize on another's good will by infringing on the trade name. *See Fisons Horticulture, Inc. v. Vigaro Indus., Inc.*, 30 F.3d 466, 474 (3d Cir. 1994) (adopting the doctrine of "reverse confusion" in trademark cases in which "a larger, more powerful company uses the trademark of a smaller, less powerful senior owner and thereby causes likely confusion as to the source of the senior user's goods and services"). The Lanham Act, therefore, benefits *all* trademark holders and those with rights protected by § 43(a). The Court of Appeals' decision accomplishes no more than what the Lanham Act intends: it arms *all* competitors with a meaningful remedy to enjoin unfair competition. *See* 15 U.S.C. § 1127. The Court of Appeals' decision thus advances the salutary purpose of the Lanham Act without inhibiting fair competition. The decision below need not be reviewed. The Petition for a Writ of Certiorari should be rejected.

CONCLUSION

For all of the foregoing reasons, Respondent American Telephone and Telegraph Company respectfully urges this Court to deny Winback's Petition for a Writ of Certiorari.

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